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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 510

SANTO R. SGARLATO, JR.

Petitioner,

v.

SOLOMON A. KLEIN,

Respondent

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Respondent opposes certiorari with respect to the claim of violation of the Fifth Amendment privilege against self-incrimination on the dual grounds (1) that petitioner voluntarily testified and withdrew any claim of privilege and (2) that proof of the charges was not dependent upon petitioner's compelled testimony. These grounds of opposition are contradicted by the facts and inconsistent with controlling legal principles.

1. Clearly, the Judicial Inquiry coerced petitioner's testimony by threat of disbarment. Respondent does not dispute the fact that when petitioner originally appeared and

responded to the Judicial Inquiry's subpoena on November 5, 1959, he refused to answer questions and to produce records in reliance on the Fifth Amendment privilege and that his submission to the Judicial Inquiry's request for information occurred after this Court's decision in *Cohen v. Hurley*, 366 U.S. 117, holding that an attorney could be disbarred for such refusal.

Respondent contends that after the *Cohen v. Hurley* decision petitioner voluntarily requested an opportunity to appear and testify and that the Judicial Inquiry's letter of October 24, 1961 acceded to this request (Br. in Opp., pp. 3-4). Regardless of the precise circumstances under which petitioner testified it seems clear that his testimony was coerced as a result of the *Cohen v. Hurley* decision. But the facts do not bear out respondent's representation of the subsequent events. Petitioner did communicate with counsel for the Judicial Inquiry before he received the letter of October 24, 1961, and offered to testify and produce records with respect to any specific matters in which the Judicial Inquiry was interested. No understanding was reached as a result of this conversation,[1] however, and petitioner did not appear to testify and produce records before the Judicial Inquiry until after he had received the letter of October 24, 1961. It is somewhat of a distortion to suggest that this letter, a copy of which is set forth in the appendix to this brief, which not only was extremely broad in scope and not limited to particular matter but also specifically adverted to this Court's affirmance of the disbarment of Cohen, was a response to petitioner's request for an opportunity to appear and testify. And respondent

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[1] Immediately following petitioner's testimony at the preliminary immediately quoted by Respondent (Br. in Opp. pp. 3-4) is the following colloquy: "Q. What understanding did you have, or did you reach an understanding with Mr. Hurley as to when you would appear or what records you would produce? A. There was no understanding." (pp. 37, 521-2.)

has not heretofore made any such claim.[2] In any event, petitioner's withdrawal of his claim of privilege under the threat of disbarment, fairly implied from the Judicial Inquiry's explicit reference to *Cohen v. Hurley*, does not constitute a waiver of his constitutional rights. The simple fact is that petitioner would have been disbarred if he had invoked the privilege in the disciplinary proceeding before this Court overruled *Cohen v. Hurley* in *Spevack v. Klein*, 385 U.S. 511. This was recognized by the New York Court of Appeals in *Zuckerman v. Greason*, 20 N.Y.2d 430, 285 N.Y.S.2d 1 (1967). Upon reconsideration after remand by this Court (386 U.S. 15), the Appellate Division, Second Department, in effect held that the failure of the petitioners to object in the disciplinary hearing to the reception of self-incriminating evidence precluded consideration of the merits of the constitutional claim. *Greason v. Zuckerman*, 28 A.D. 2d 907, 282 N.Y.S.2d 951. The Court of Appeals, however, passed upon the merits of the constitutional claim, expressly recognizing that the attorneys' reliance on the privilege could have resulted in their disbarment:

> Appellants now contend that sustaining them [the charges] wholly or partly on the basis of data submitted by Zuckerman and Haber is unconstitutional under the holding of the Supreme Court in their case in light of *Spevack* and *Garrity*. * * * If Zuckerman and Haber's constitutional contention be correct on this appeal, it might be argued with

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[2] Respondent's version of the events as set forth in his brief in the Appellate Division is as follows:

"On November 5, 1959, respondent [petitioner here] was called before the Judicial Inquiry, pursuant to subpoena. He refused to answer proper questions put to him upon the grounds that to give answers to the questions would tend to incriminate him. Following *Cohen v. Hurley*, 366 U.S. 117, respondent was re-called as a witness before the Judicial Inquiry on November 2, 1961. He withdrew his plea of Fifth Amendment rights, testifying and producing records required by the subpoenas served upon him."

some force that neither of them was obliged to object in order to raise the point, in as much as making that objection could have resulted automatically in their disbarment for so long as *Cohen v. Hurley* remained the law.

Petitioner's failure to claim the privilege under the threat of disbarment for doing so cannot be construed as a waiver of the constitutional claim. "There is a presumption against a waiver of constitutional rights * * * and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or previlege". *Brookhart v. Janis*, 384 U.S. 1, 4. If every reasonable presumption against the waiver of fundamental constitutional rights in indulged (*Johnson v. Zerbst*, 304 U.S. 458, 464; *Glasser v. United States*, 315 U.S. 60, 70), the "high standards of proof for the waiver of constitutional rights" to establish that "the waiver is made voluntarily, knowingly, and intelligently" (*Miranda v. Arizona*, 384 U.S. 436, 475) have obviously not been met.

Petitioner promptly invoked the privilege against self-incrimination after this court on January 16, 1967, held in *Spevack v. Klein*, 385 U.S. 511, overruling *Cohen v. Hurley*, *supra*, that an attorney's reliance upon the privilege could not be the basis for disbarment. At that time cross-motions to confirm and disaffirm Justice Pette's report on the disciplinary proceedings, dated April 12, 1966, were pending before the Appellate Division. The Appellate Division made its ruling on February 14, 1967. On April 10, 1967, petitioner moved for reargument and, alternatively, for leave to appeal to the Court of Appeals relying upon this Court's decision in *Spevack v. Klein*. In the circumstances, the claimed abandonment of the privilege is rendered irrelevant by petitioner's renewed reliance upon it after this Court's decision in *Spevack v. Klein*. This decision constituted a supervening event which permitted the constitutional question to be raised again by petitioner's motion for reargument. *State Farm Ins. Co. v. Duel*, 324 U.S. 154, 160-161; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673.

Moreover, the federal constitutional question raised by the motion for reargument in the Appellate Division and urged on the appeal in the Court of Appeals is appropriately presented for review by this Court since it was considered and passed upon by the courts below. *Great Northern Ry. co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 367; *Whitney v. California*, 274 U.S. 357, 360. The Appellate Division obviously considered the constitutional question to have been properly presented when, by its order of July 10, 1967, it granted petitioner leave to appeal certifying that "questions of law have arisen which in its opinion ought to be reviewed by the Court of Appeals." The only questions of law involved were the constitutional ones. The Court of Appeals similarly considered the constitutional question to be properly before it since its amended remittitur recited that on appeal there was presented and necessarily passed upon the question of whether petitioner "was deprived of due process in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States in that there were introduced against him in this disciplinary proceeding statements elicited from him under threat of disbarment if he did not make such statements. The Court of Appeals held that there was no violation of appellant's [petitioner's] constitutional rights."

The Court of Appeals' assumption that the constitutional question was before it and its disposition of that question eliminate any problem for this Court with respect to whether the constitutional question was properly raised below. *Whitney v. California*, 274 U.S. at 360-361; *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436.

Respondent's intimation that the Court of Appeals' express holding that "There was no violation of appellant's constitutional rights" was based upon a determination that petitioner did not properly assert a claim of privilege is contrary to the plain reading of the language employed. This

Court construed virtually identical language by the New York Court of Appeals in *Lanza v. New York*, 370 U.S. 139, 142 n. 6, as making clear that the Court "had passed upon this federal constitutional claim, and that its judgment was not based upon an independent state ground." The Court of Appeals' obvious deliberate repetition of this phraseology in the present case requires the same conclusion here.

2. Respondent makes a blanket denial of petitioner's assertion that "virtually all the proof was derived from petitioner's compelled disclosure and production". He supports this blanket denial by the assertion that proof of "some" of the charges was not based on petitioner's testimony or on records that he had produced and proceeds to discuss the evidence with respect to but four of the fifteen charges sustained.

Respondent's contention in this respect is subject to a number of shortcomings. Petitioner categorically asserts that virtually all the evidence at the disciplinary hearing consisted of his coerced testimony and records or was derived from leads obtained through his compelled disclosures. Although petitioner extensively argued the constitutional claim of privilege in his motion for reargument in the Appellate Division and on his appeal in the Court of Appeals, respondent has not heretofore contended that the charges were sustainable on the basis of uncoerced evidence, which would have been an independent state ground of decision, and the Court of Appeals did not dispose of the case on that ground. Moreover, even now, when this contention is advanced for the first time, respondent makes no claim that the evidence supporting the four charges discussed was not obtained through leads provided by petitioner's compelled evidence. And even respondent's discussion of the four charges makes clear that they could not have been established without leads provided by petitioner or by his direct evidence. In his discussion of each of the four charges, respondent relies upon petitioner's testimony

and it appears that without this testimony the evidence was insufficient to support the charge. Furthermore, since the Appellate Division sustained fifteen charges against petitioner, respondent's reference to only four is an admission that eleven of the charges were established by the evidence coerced from petitioner. Certainly, it cannot be assumed that the penalty of suspension which will be destructive of petitioner's practice and livelihood would have been imposed on the basis of four charges particularly in the light of the findings of the Supreme Court Justice who heard the evidence "that no complaint was ever made by "any of his clients, that many of the charges were "due to his inexperience and ignorance," and that he "has demonstrated that he has a potential useful service to the public and the bar."

Respondent's suggestion that some of the charges were established by independent proof is belied by the fact that the Judicial Inquiry took no action when petitioner invoked the constitutional privilege on November 5, 1959. Some two years later, after this Court's decision in *Cohen v. Hurley*, the Judicial Inquiry resumed the practice of obtaining information by the implied threat of disbarment and recalled petitioner to furnish inculpatory information. Charges were not preferred until November, 1964, after petitioner had given almost 500 pages of testimony before the Judicial Inquiry. His testimony at the disciplinary hearings with respect to the charges exceeded 1100 pages.

Respectfully submitted,

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Attorney for the Petitioner

APPENDIX

JUDICIAL INQUIRY
SUPREME COURT, KINGS COUNTY
BOROUGH HALL, BROOKLYN 1, N.Y.
MAIN 4-7851

DENIS M. HURLEY
Counsel

October 24, 1961

Santo R. Sgarlato, Jr., Esq.
26 Court Street
Brooklyn 1, New York

Dear Sir:

On November 11, 1959 you refused to answer questions pertaining to your law practice before the Additional Special Term on the ground of possible self incrimination. As you are probably aware, the Supreme Court of the United States as well as the New York Court of Appeals has now affirmed the decision of the Appellate Division, Second Judicial Department disbarring Albert Martin Cohen for his refusal to answer pertinent questions before the Additional Special Term, albeit Mr. Cohen likewise based this refusal on the grounds of self incrimination (9 A.D. 2d 436; aff'd. 7 N.Y.2d 488; aff'd. 366 U.S. 117.)

Mr. Justice Baker is prepared to accord you another opportunity to testify at the Additional Special Term if you will appear at Room 301, Borough Hall, on November 2, 1961, at 10:30 a.m. You should bring with you all financial records pertinent to your practice of law as described in the subpoena duces tecum served upon you. You will subsequently be asked to produce certain of the legal files relating to cases processed by yourself. However, for the time being, it will be sufficient if you produce the above mentioned financial records.

Should you fail to appear at the date and time specified, it will be deemed that you wish to stand on the record of your prior appearance before the Additional Special Term.

JUDICIAL INQUIRY

JOSEPH A. ESQUIROL, JR.
Assistant Counsel

JAE:cas
By Hand